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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

E.M., a minor, by and through his parents, E.M. and E.M., Plaintiffs, v. PAJARO VALLEY UNIFIED SCHOOL DISTRICT, OFFICE OF ADMINISTRATIVE HEARINGS, and CALIFORNIA DEPARTMENT OF EDUCATION, Defendants.	Case Number C 06-4694 JF ORDER[1] GRANTING IN PART AND DENYING IN PART MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD [re: docket no.]

I. BACKGROUND

This lawsuit arises out of E.M.'s claim that he has been and is being denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 *et seq*. The IDEIA provides that in order to receive federal funding a state must have a policy in effect that assures all children with disabilities the right to a FAPE. 20 U.S.C. § 1412(a)(1). If a child qualifies for special education

[1] This disposition is not designated for publication and may not be cited.

services under the IDEIA, the child's instruction is based upon an Individualized Education Program ("IEP"). 20 U.S.C. § 1414(d).

In California, the responsibility to identify children with disabilities and determine appropriate educational placements and related services through the IEP process is placed by statute on the "district, special education local plan area, or county office" of the child's residence. Cal. Educ. Code § 56300. A parent may file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). Upon the receipt of such administrative complaint, the local educational agency has thirty days to resolve the matter to the parent's satisfaction. 20 U.S.C. § 1415(f)(1)(B)(ii). If the local educational agency fails to resolve the matter within thirty days, the parent may proceed with an impartial due process hearing conducted by the state educational agency. 20 U.S.C. §§ 1415(f)(1)(A), 1415(f)(1)(B)(ii). All applicable timelines for a due process hearing commence upon the expiration of this thirty-day period. 20 U.S.C. § 1415(f)(1)(B)(ii). In California, the state educational agency, California Department of Education ("CDE"), contracts with Defendant OAH to conduct due process hearings. Any party aggrieved by the final administrative decision resulting from a due process hearing may seek *de novo* judicial review in a district court of the United States or in a state court of competent jurisdiction. 20 U.S.C. § 1415(i)(2)(A).

E.M., a student in Defendant Pajaro Valley Unified School District ("PVUSD"), claims that he is eligible for special education services and has been denied such services by PVUSD. E.M. filed an administrative complaint against PVUSD before Office of Administrative Hearings ("OAH") on December 5, 2005, which complaint was rejected for insufficiency. On January 4, 2006, E.M. filed an amended administrative complaint, which was deemed sufficient. An Administrative Law Judge ("ALJ") conducted a prehearing conference on February 23, 2006, and commenced a six-day due process hearing on February 28, 2006. E.M. claimed among other things that he had been denied a FAPE from 2002 onward, and that his parents were entitled to reimbursement for independent assessments, evaluations and services obtained on behalf of

E.M.. The ALJ issued a decision unfavorable to E.M. on May 8, 2006.

E.M. filed the instant action on August 2, 2006, and on December 15, 2006, filed the operative FAC asserting the following claims: (1) an appeal from the ALJ's decision, seeking judicial *de novo* review as to whether E.M. is entitled to special education services and related issues (asserted against PVUSD); (2) a claim for violation of the IDEIA (asserted against CDE and OAH), based upon the ALJ's alleged failure timely to issue the administrative decision; (3) a claim for violation the Unruh Civil Rights Act, Cal. Civ. Code § 51; and (4) a claim for violation of the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq*. (asserted against PVUSD). On May 18, 2007, the Court dismissed the second claim without leave to amend.

E.M. moves to supplement the administrative record of the due process hearing that is the subject of this action. E.M. asserts that at the hearing the ALJ improperly determined that the District was correct in dismissing its initial IQ test performed by psychologist Leslie Viall as unreliable. E.M seeks to introduce testimony from Dr. Alan Kaufman regarding the reliability of these results. E.M. also seeks to introduce recent assessment, ADHD diagnosis and school grades. Defendants oppose E.M's motion.

III. DISCUSSION

The IDEIA provides in pertinent part that "the court shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(ii). "The Ninth Circuit has construed 'additional' evidence to mean supplemental information. Therefore, witnesses before the district court may not repeat or embellish their prior administrative hearing testimony.'" *K.S. v. Fremont Unified Sch. Dist.*, No. 06-7218, 2007 WL 2554658 at *4 (N.D. Cal. Sept. 4, 2007) (internal citations to *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993) omitted).

> The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

Ojai, 4 F.3d at 1473.

In his decision, the ALJ states that the "crux of the dispute . . . is whether the District used the correct intellectual ability score. . . when it determined that Student was not eligible . . ." Decision ¶23. E.M. argues that Dr. Kaufman's testimony should be admitted because it will assist the Court in determining whether the ALJ correctly excluded the results of the K-ABC assessment. E.M. also alleges that he was unable to present Dr. Kaufman's testimony previously because he learned for the first time at the due process proceeding that the District would present arguments about the viability of the K-ABC test.[2] Accordingly, the Court will admit the proposed declaration from Dr. Kaufman for the limited purpose of adducing the significance of the K-ABC score. Defendants may submit an expert declaration in rebuttal, should they wish to do so.

E.M. also argues his recent assessment, ADHD diagnosis and grades should be admitted because this evidence will shed light on the correctness of the ALJ's determination.[3] Defendants argue that this evidence is not relevant to the Court's analysis of the diagnosis during the relevant time period. "In deciding what evidence may be introduced to supplement the record, courts should be mindful not to transform proceedings into a trial de novo. *Ojai*, 4 F.3d at 1473. ("The determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the

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[2] Defendants assert that all of the appropriate procedures were followed and that Plaintiff's full due process rights were insured. Pursuant to the regulations governing the formal hearing procedures before the OAH, the parties in this case exchanged lists of documentary evidence, witness and scope of witness testimony prior to the due process hearing. It is clear that E.M.'s legal representatives knew that E.M.'s eligibility and the meaning of the various assessments were at issue because they presented the claim in their request for a due process hearing.

[3] E.M. also contends that this evidence is relevant to fashioning appropriate relief pursuant to 20 U.S.C. § 141415(e), which provides courts with discretion to "grant such relief as the court determines is appropriate." However, he does not cite any authority indicating that the Court's discretion to fashion appropriate relief has any bearing on the issue of whether to admit supplemental evidence.

hearing from one of review to a trial de novo."). The Ninth Circuit has held that educational programs are reviewed not in hindsight but in light of the information available at the time the program was developed. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1993) ("Actions of the school system cannot . . . be judged exclusively in hindsight."). Because the Court concludes that the after-acquired evidence E.M. seeks to introduce is not necessary to evaluate the ALJ's determination, it will not be admitted.

IT IS SO ORDERED.

DATED: June 2, 2008

JEREMY FOGEL
United States District Judge

This Order has been served upon the following persons:

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